83-6226

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

APPEAL FROM THE SOUTH CAROLINA SUPREME COURT

STERLING BARNETTE SPANN,

APPELLANT,

V.

THE STATE OF SOUTH CAROLINA

RESPONDENT.

JURISDICTIONAL STATEMENT

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ATTORNEYS FOR APPELLEE

QUESTION PRESENTED

WHETHER S.C.CODE ANN. §16-3-20(C)(a)(1)(d)(IS CONSTITUTIONALLY INVALID AS BEING REPUGNANT TO THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AS APPLIED IN THE APPELLANT'S CASE, WHEN THE FOREGOING STATUTE HAS BEEN UNFORSEEABLY ENLARGED BY JUDICIAL CONSTRUCTION AND GIVEN RETROACTIVE APPLICATION TO THE APPELLANT?

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OPINION BELOW

The opinion of the Supreme Court of South Carolina is reported in State v. Spann, ___ S.C. ___, 308 S.E.2d 518 (1983). It is reproduced in the Appendix to this Petition at A-1 to A-4. The per curiam order of the South Carolina Supreme Court dated November 7, 1983, denying rehearing of petitioner's appeal is unreported. It is reproduced in Appendix at A-5.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on October 13, 1983. A timely petition for rehearing was denied on November 7, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(2), the lower court's opinion in application of S.C. Code Ann. §16-3-20(c)(a)(1)(d) being repugnant to the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. See Cohen v. California, 403 U.S. 15 (1971) as to jurisdiction under 28 U.S.C. 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth Amendment to the Constitution of the United States, which provides in pertinent part:

> "No person shall. . .be deprived of life, liberty, or property, without due process of law;. . . ."

the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "No state shall. . .deprive any person of life, liberty, or property, without due process of law;. . . ."

and the Eighth Amendment to the United States Constitution, which provides in pertinent part:

> ". . .Nor cruel and unusual punishments inflicted. . . ."

2. This case also involves the constitutionality of S.C. Code Ann. §§16-3-20 et seq. (Cum.Supp. 1982). These statutory provisions are set forth in the Appendix at A-6 to A-9. See A-6 for S.C. Code Ann. §16-3-20(c)(a)(1)(d).

STATEMENT OF THE CASE

Sterling Barnette Spann was convicted and sentenced to death in a South Carolina state court for the murder of Melva Harper Neil. The state sought to prove that Appellant burglarized Neil's residence, where he robbed her, committed criminal sexual conduct upon her, and murdered her. Evidence linking Appellant to Neil's death consisted of his possession of a gold coin which was similar to one owned by the deceased and taken during the incident and discovery of his palm print on a piece of paper which was found on the deceased's bed. In addition to being convicted of murder, Appellant was also convicted of criminal sexual conduct in the first degree, robbery, and burglary.

Neil's death occurred on September 15, 1981. At that time, South Carolina used the common law definition of burglary to establish the elements of this offense: the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony therein. On October 5, 1981, the South Carolina Supreme Court, acting under its "authority to modify the common law in certain circumstances," held that it would

> no longer require as an ingredient of burglary, "intent to commit a felony."
>
> Any indictment hereafter which charges one with breaking and entering the dwelling of another in the nighttime with intent to commit any crime, a felony or a misdemeanor, is sufficient. State v. Brooks, 217 S.C. 111, 113, 283 S.E.2d 830, 831 (1981).

Appellant was indicted for burglary along with the other offenses for which he was convicted on October 19, 1981. Consistent with the common law definition of burglary in effect on September 15, 1981, the indictment charged that Appellant did "in the nighttime, break and enter the dwelling house of another, to wit: Mrs. Melva Harper Neill with intent to commit a felony therein." Trial transcript (Tr.) at 1359. Appellant was tried the following April. At trial, the court granted the state's motion to amend the

indictment to conform with the definition of burglary set forth in the holding of the South Carolina Supreme Court in Brooks, supra. Defense counsel did not oppose this motion. Tr. at 1053 to 1054. In charging the jury on the intent sufficient to support a conviction of burglary, the court stated:

> To constitute burglary, both the breaking and entering must be with the intent to commit a crime therein and it is essential that such intent exist at the time of the breaking and entering and it is not sufficient that such intent was formed after the entry.
>
> * * *
>
> [I]n order to justify a verdict of guilty on the charge of burglary, you must find beyond a reasonable doubt. . .that the breaking and entering was with intent to commit a crime therein. . . Tr. at 1132 to 1133.

A separate sentencing hearing was held pursuant to S.C. Code Ann. §16-3-20 (Cum.Supp. 1982) to determine whether Appellant should be sentenced to death or to life imprisonment. Section 16-3-20(C) provides that a capital defendant may not be sentenced to death unless the sentencing authority first finds the existence of at least one statutory aggravating circumstance to have been proved beyond a reasonable doubt. In this case, the state relied upon its proof during the guilt phase of trial that the murder was committed while in the commission of burglary.[1] S.C. Code Ann. §16-3-20(C)(a)(1)(d)(Cum.Supp. 1982). In its penalty phase instructions, the trial court reminded the jury that it had already found Appellant guilty of burglary and did not undertake to redefine the elements of this statutory aggravating circumstance. Tr. at 1219 to 1220. The jury found that the statutory aggravating circumstance of

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[1]The South Carolina General Assembly has never established or broadened the elements of burglary by statute. Several statutes, however, relate to the offense. S.C. Code Ann. §16-1-10 (1976), classifies burglary as a felony; §16-11-310, speaking of the "crime of burglary at common law," establishes the penalty at life imprisonment unless the jury recommends mercy; and §16-11-10 defines a dwelling house.

burglary (as defined by State v. Brooks, supra) had been proved beyond a reasonable doubt, and recommended that Appellant be sentenced to death. Tr. at 1405.

On appeal to the South Carolina Supreme Court, Appellant's conviction for burglary and sentence of death were affirmed.

As noted above, Appellant's trial counsel did not object to the amendment of the indictment for burglary. Because South Carolina has no contemporaneous objection rule in capital cases, however, and permits assignments of legal errors in such cases to be made for the first time on appeal, State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981), Appellant objected to the jury instructions on the intent element of burglary and to the sentence of death based upon a finding of the statutory aggravating circumstance of burglary (as permitted by S.C. Code Ann. §16-3-20(C)(a)(1)(d)) through the following exceptions:

> 5) The lower court erred in allowing the indictment for burglary to be amended to read "with the intent to commit a crime therein"; the error being that the broadening of the elements of a crime after the alleged criminal act violates State law and creates an ex post facto crime in violation of the Fifth and Fourteenth Amendments.
>
> 6) The lower court erred in allowing the crime of burglary to be submitted to the jury as an aggravating circumstance when the indictment for burglary was impermissibly amended in violation of the Fifth and Fourteenth Amendments; the error being that the finding of burglary as an aggravating circumstance after such improper amendment, which created an ex post facto crime, violates State law, creates an arbitrary factor in violation of the Eighth Amendment, and violates his Fourteenth Amendment rights to due process. Tr. at 1415 to 1416.

Appellant briefed and argued, inter alia, the following questions in his Brief of Appellant:

> I
>
> Did the lower court err in charging the jury that burglary required only the intent "to commit a crime therein" which when applied retroactively to this appellant's conduct, violated the prohibitions against ex post facto laws?

lands of another* * * after notice from the owner or tenant prohibiting such entry* * *." Id. at 349. The petitioners had engaged in a sit-in demonstration at the lunch counter of a pharmacy. They refused to leave when asked to do so. Their convictions for criminal trespass were affirmed by the South Carolina Supreme Court, even though it was conceded that they had received no notice prohibiting entry. Relying on a recent case that construed the statute to reach the situation where one remained on another's premises after receiving notice to leave,[2] the state court found the evidence sufficient to sustain a conviction.

The Court reversed. Relying on "the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits," Id. at 350, the Court found that the due process violation in Bouie was similar to a violation of the Ex Post Facto Clause:[3]

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, §10, of the Constitution forbids. An ex post facto law has been defined by this Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action," or "that aggravating a crime, or makes it greater than it was, when committed." If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Id. at 353-354 (citations and footnote omitted) (emphasis in original).

The principles used to reach the result in Bouie have retained their vitality through the years. In Marks v. United States, 430 U.S. 188 (1977), the Court applied the rationale set forth in Bouie and found that another judicial interpretation of a statute could not be applied retroactively consistent with the Due Process Clause. Unlike the statute in Bouie, which was precise and narrow on its face,

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[2] City of Charleston v. Mitchell, 239 S.C. 376, 123 S.E.2d 512 (19561), reversed, 378 U.S. 551 (1964).

[3] U.S. Const. art. I, §9; art. I, §10.

the statute in Marks prohibited transporting obscene materials in interstate commerce, and had been strictly construed by the Court so that its operation would be consistent with First Amendment freedoms. During the time that the petitioners had engaged in the conduct in question, the standard for determining whether materials were obscene was whether they were "utterly without redeeming social value."[4] At the time of trial, the test was "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[5] The Court, applying Bouie, found that the petitioners were entitled to jury instructions which defined obscenity under the standards which prevailed at the time of their actions.

In this case, the crime for which Appellant was convicted occurred when South Carolina used the common law definition of burglary to establish the elements of the offense. This definition required that the state prove beyond a reasonable doubt that a nighttime breaking and entry into a dwelling was accompanied by a felonious intent. State v. Clamp, 225 S.C. 89, 80 S.E.2d 918 (1954). Brooks, supra, changed the element of intent to require merely proof that the perpetrator intended to commit any grade of offense. This change in the substantive elements of burglary had two effects. First, the quantum of proof that the state was required to produce to sustain a conviction for burglary was lessened.[6] A retroactive change in the law which requires less or different evidence than that required at the time of the commission of the offense violates the Ex

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[4] Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

[5] Miller v. California, 413 U.S. 15, 24 (1973).

[6] Since Brooks, entering with intent to commit a criminal trespass, petit larceny, or simple assault would constitute burglary, even though the actor possessed a non-felonious intent. These actions would have constituted the statutory offense of housebreaking, S.C. Code Ann. §16-11-320(2) (Cum. Supp. 1982), prior to Brooks. See, n. 7, infra.

Post Facto Clause, Malloy v. South Carolina, 237 U.S. 180 (1915), and using the analogy made in Bouie, the Due Process Clause.

Second, the change made in Brooks had the effect of enlarging the scope of the offense of burglary so that some criminal conduct which might have previously fallen within the prohibitions of South Carolina's housebreaking statute, S.C. Code Ann. §16-11-320(2) (Cum. Supp. 1982),[7] carrying a maximum penalty of five years, now can be punished as burglary, which carries a penalty of life imprisonment unless the jury recommends mercy. S.C. Code Ann. §16-11-310 (1976). A retroactive enhancement of punishment violates the ex post facto prohibition, Weaver v. Graham, 450 U.S. 24 (1981), and the holding in Bouie dictates that this result cannot be achieved through judicial action.

The error in this case, as in Marks, supra, occurred when the jury was permitted to arrive at its verdict under instructions that permitted a finding of guilty using standards that were not in effect at the time that the offense was committed. The opinion of the South Carolina Supreme Court in Spann, supra, ignores the principles set forth by this Court in Bouie. That opinion notes that Appellant was convicted of several felonies, suggesting that the court reasoned from this that the jury must have found that Appellant possessed a felonious intent at the time of entry, a finding which would have sustained a conviction for burglary under the elements of the offense which existed

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[7] That statute provides in pertinent part:

> (2) Every person who shall break and enter or who shall break with intent to enter, in the daytime, any house other than a dwelling house or who shall break and enter or shall break with intent to enter, in the nighttime, any house, the breaking and entering of which would not constitute burglary, with intent to commit a felony or other crime of a lesser grade, shall be deemed guilty of a felony and upon conviction shall be punished at the discretion of the court by imprisonment for a term not exceeding five years.

before the Brooks decision. This approach, however, is tantamont to a judicial direction of a verdict of guilty on the intent element of the offense, a procedure which is always impermissible. Connecticut v. Johnson, ___ U.S. ___, 103 S.Ct. 969 (1983) (plurality opinion).

The retroactive application of Brooks, supra, violated this Court's holding in Bouie. Contrary to the lower court's opinion, the retroactive application of Brooks to S.C. Code §16-3-20(C(a)(1)(d) renders the statute repugnant to the constitution due to the retroactive expansion of the type of conduct which constitutes capital murder.

II.

PLENARY REVIEW IS WARRANTED BECAUSE A SENTENCE OF DEATH BASED UPON A RETROACTIVE CHANGE IN THE LAW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS' REQUIREMENT OF SPECIAL RELIABILITY AND CONSISTENCY IN THE FINDING THAT DEATH IS THE APPROPRIATE PUNISHMENT IN A PARTICULAR CASE.

As noted above, the appellant's jury recommended a sentence of death upon a finding that the murder was committed while in the commission of a burglary. The state presented no additional evidence at the penalty phase of trial and no additional instructions were given by the court on the elements of burglary.

The imposition of the death penalty invokes the Eighth Amendment's requirement of special reliability and consistency in the decision that death is the appropriate punishment in a particular case. Eddings v. Oklahoma, 455 U.S. 104 (1982); Woodson v. North Carolina, 428 U.S. 280 (1976). The use of statutory aggravating circumstances as checks on the sentencing discretion of capital juries is the essence of South Carolina's attempt to provide "a meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring). Hence, injecting into the jury's sentencing deliberations the arbitrary and capricious factor of a retroactive expansion of the range of conduct punishable by death is a

practice which cannot be tolerated in any capital sentencing scheme consistent with the Eighth Amendment.

In Presnell v. Georgia, 439 U.S. 14 (1978) (per curiam), the Court reversed a death sentence based on evidence of a rape which was alleged at trial but not unambiguously found to exist by the jury. As characterized by Justice Rehnquist, the Court's holding in Presnell was that "the Georgia Supreme Court was not entitled to rely on evidence in the record" to supply an element of the statutory aggravating circumstance when the jury's finding of that element had been reversed by the state supreme court due to a fatal ambiguity in the instructions. Id. at 19-20 (Rehnquist, J., dissenting on other grounds). As the opinion of the Georgia Supreme Court in Presnell made clear, the ambiguity in the rape instructions at Presnell's trial could hardly have determined the outcome, because the evidence overwhelmingly established his guilt of that offense. Presnell v. State, 241 Ga. 49, 243 S.E.2d 496 (1978). The error identified by the Court in Presnell was not that the defendant's guilt had been determined inaccurately but that it had not been determined at trial by the jury, to whose consideration he was constitutionally entitled. Hence, the resulting death sentence could not stand.

The Eighth and Fourteenth Amendments required a similar result in this case. Section 16-3-20 (C) of the South Carolina Code (Cum. Supp. 1982) provides that each element of a statutory aggravating circumstance must be proved to the jury's satisfaction beyond a reasonable doubt. The instruction in this case removed from the jury's consideration the question of whether appellant's intent upon entry was felonious rather than merely unlawful. To the extent that S.C. Code §16-3-20(C)(a)(1)(d) has been applied by the South Carolina Supreme Court as permitting this retroactive application of the law, the statute is unconstitutional as being violative of Due Process of Law. Bouie v.

City of Columbia, supra. This error was not cured by the appellate determination that correct instructions on the element of intent would have made no difference, because such a determination denies the appellant the right to have a jury consideration of the evidence on each element of the aggravating circumstance.

CONCLUSION

For the foregoing reasons, plenary review of the Appellant's case is warranted, and his sentence of death should properly be vacated.

Respectfully submitted,

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ATTORNEY FOR APPELLANT
(803) 758-8601

This 3rd day of February, 1984.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Sterling Barnett Spann, ... Appellant.

Appeal From York County
Robert L. McFadden, Judge

Opinion No. 21992
Filed October 13, 1983

AFFIRMED

David I. Bruck; and Assistant Appellate Defender Elizabeth C. Fullwood, of S. C. Commission of Appellate Defense, both of Columbia, for appellant.

Attorney General T. Travis Medlock and Retired Attorney General Daniel R. McLeod, Assistant Attorney General Harold M. Coombs, Jr., and Staff Attorney Carlisle Roberts, Jr., all of Columbia; and Solicitor William L. Ferguson, of York for respondent.

HARWELL, A. J.: A jury in York County convicted appellant Sterling Barnette Spann of burglary, robbery, criminal sexual conduct in the first dgree, and murder. The jury recommended a death sentence. This case consolidates Spann's direct appeal and mandatory review of the death sentence.

On September 14, 1981, an assailant entered the Clover home of Mrs. Melva Harper Neil and stole certain personal property, committed a sexual battery on the 82 year old widow, and killed her. Appellant was arrested and pleaded not guilty to the charges.

Appellant asserts that several errors justify reversal of the jury's finding of guilt and its recommendation of the death penalty. We disagree and affirm.

Appellant first asserts error in the voir dire process. Prior to trial, he moved to prohibit questioning of members of the jury venire concerning their beliefs about capital punishment. His position was that this inquiry would not result in a jury representing a cross-section of the community. This court resolved that issue contrary to the appellant's position in State v. Goolsby, 275 S. C. 110, 268 S. E. 2d 31 (1980), cert. denied, 449 U.S. 1037 (1980). When a potential juror is prevented from rendering an impartial decision or voting for the death penalty, the trial court can exclude him because of his inability to carry out his duty under the law. State v. Hyman, 276 S. C. 558, 281 S. E. 2d 209 (1981), cert. denied, 102 S. Ct. 3510 (1982).

THE STATE V. SPANN

Appellant next asserts that the lower court erred in disqualifying certain prospective jurors because their responses to questions about the death penalty were ambiguous. Considering the entire colloquy with these veniremen, we find that the court properly disqualified them. State v. Butler, 290 S. E. 2d 1 (1982), cert. denied, 103 S.Ct. 242 (1982). The alleged error in the trial judge's qualification of certain other jurors also has no merit. A juror's competence is within the trial judge's sole discretion and is not reviewable on appeal unless wholly unsupported by the evidence. S. C. Code §14-7-1020 (1976); State v. Thompson, 278 S. C. 1, 292 S. E. 2d 581 (1982); State v. Hyman, supra.

Appellant excepts to the lower court's refusal to exclude another juror on grounds that he had formed an opinion about the case prior to trial. The trial court did not, however, abuse its discretion because the juror stated, in effect, that he could be fair and impartial. State v. Franklin, 267 S. C. 240, 225 S. E. 2d 896 (1976).

Appellant further argues that the trial judge should have directed a verdict on the crime of burglary because the state failed to prove a breaking. The trial court is concerned with the existence of evidence rather than its weight in ruling on a motion for a directed verdict. State v. Hyman, supra. We have reviewed the testimony and it is more than adequate to require the submission of this case to the jury. State v. Kennedy, 272 S. C. 231, 250 S. E. 2d 338 (1978). Opening a window constitutes a breaking. State v. Clamp, 225 S. C. 89, 99, 80 S. E. 2d 918, 922 (1954). The smudged palmprints pointing inward and blood of his type found on the windowsill are evidence from which the jury could infer that the appellant climbed into the house through a closed window. Also, chipped paint was found under the window inside the house. When police investigated, the storm window was still pushed up. The circumstantial evidence here was sufficient to sustain the burglary conviction. State v. Kimbrough, 212 S. C. 348, 46 S. E. 2d 273 (1948).

Appellant cites several civil cases, e.g., Green v. Shaw, 136 S. C. 56, 134 S. E. 226 (1926), to support his contention that evidence of the decedent's habits of care was not admissible to prove she acted in conformity with them on this occasion. Green was a negligence case against a physician in which habit evidence was held inadmissible to prove the doctor acted in conformity with a certain standard of care. These cases do not apply here. The habit evidence here was not necessary to the finding of burglary in view of the other evidence mentioned above and was therefore cumulative. However, this court has upheld the admission of habit evidence on the issue of breaking. State v. Hart, 94 S. C. 214, 77 S. E. 862 (1913).

Since the state proved the elements of burglary, it properly relied on that crime as an aggravating circumstance under Code §16-3-20 C)(a)(1)(d)(1982 Cum. Supp.).

Appellant contends that he was placed in double jeopardy by his sentences for both burglary and murder while in the commission of burglary. This argument lacks merit. Under the constitutional prohibition against double jeopardy, a defendant cannot be punished for an offense and a lesser included

offense established by the same acts. State v. Lawson, Opinion No. 21962, filed July 20, 1983. The crimes of burglary and murder require the proof of entirely different elements. The connection between the two in the case at bar is that burglary is the aggravating circumstance on which the state relied in seeking capital punishment. The double jeopardy clause does not protect appellant here.

Appellant additionally argues that the change in the burglary indictment at trial to include intent to commit a crime rather than a felony, State v. Brooks, 277 S. C. 111, 283 S. E. 2d 830 (1981), is an ex post facto law. The amendment of the indictment did not create a greater punishment than would have attached at the time of the offense. State v. Logan, 277 S. C. 252, 286 S. E. 2d 125 (1982). The arrest warrant stated that appellant entered the house to commit murder. The jury in fact convicted him of serveral felonies. Appellant had full notice of the crimes of which he was charged. This exception has no merit.

Appellant also contends that the jury charge was incorrect in several respects. We have held that to equate substantial doubt with reasonable doubt is not error. State v. Butler, supra. The charge here taken as a whole is sufficient. State v. Hyman, supra. The trial judge's charge that any sentence of life imprisonment must be unanimous was harmless error. We held in State v. Adams, 277 S. C. 115, 283 S. E. 2d 582 (1981), that the jury need not be aware of the fact that the legal effect of an unalterably divided jury is a life sentence.

Appellant asserts that the solicitor's closing argument in the guilt phase was so inflammatory that it appealed to the jury's passion and prejudice. A review of the argument in the context of the entire record indicates that it did not deprive appellant of a fair determination of guilt or innocence. State v. Linder, 276 S. C. 304, 278 S. E. 2d 335 (1980). Appellant contends that the solicitor improperly argued the facts of the criminal sexual conduct during the sentencing phase. Although the state used burglary as the aggravating circumstance, the solicitor was not limited in his argument to the facts relating to burglary. The acts of appellant in their entirety were relevant to the sentence the jury was to recommend.

After a thorough review of the record, we find that the imposition of the death sentence was not the result of prejudice, passion, or any other arbitrary factor. The evidence supports the jury's finding beyond a reasonable doubt that the statutory aggravating circumstance of burglary was present. The state presented strong evidence of appellant's guilt. Blood of his type was found at the scene, his fingerprints matched those found on papers on the victim's bed, and police found him in possession of the victim's property.

We have examined other death penalty cases in this state in order to determine the proportionality of the penalty to the one imposed in similar cases. Code §16-3-25 (C)(3). The facts here are sufficiently egregious to justify a punishment of death. Appellant broke into an elderly woman's home, stole money and jewelry, assaulted her sexually, and killed her by strangulation. The death penalty is fully justified. (See the capital cases cited in State v. Adams, supra.)

Appellant urges us to differentiate this case, where the evidence is circumstantial, from other capital cases. We decline to do so. Most of these cases involve circumstantial evidence.

We have searched the record for reversible error and find none. The convictions and sentence of appellant are accordingly,

AFFIRMED.

LEWIS, C.J., LITTLEJOHN, NESS, and GREGORY, JJ., concur.

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

November 7, 1983

Ms. Elizabeth C. Fullwood
Assistant Appellate Defender
Suite 301
1122 Lady Street
Columbia, South Carolina 29201

Re: The State v. Sterling Barnett Spann

Dear Ms. Fullwood:

The Court has this day refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing is denied,

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J. B. Ness A.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

November 7, 1983."

The remittitur is being sent down today.

Very truly yours,

CLERK

CND,Jr/lbb

cc: Staff Attorney Carlisle Roberts, Jr.

S.C. Code §§16-3-20 et seq.

S.C. Code §16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life and shall not be eligible for parole until the service of twenty years, notwithstanding any other provisions of law. Provided, however, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant and his counsel shall be permitted to present arguments for or against the sentence of death. The defendant and his counsel shall have the closing argument regarding the sentence imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:
(a) Aggravating circumstances:
(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;
(2) Murder was committed by a person with a prior record of conviction for murder;

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
(4) The person committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;
(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;
(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
(b) Mitigating circumstances:
(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;
(3) The victim was a participant in the defendant's conduct or consented to the act;
(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;
(5) The defendant acted under duress or under the domination of another person;
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
(7) The age or mentality of the defendant at the time of the crime;
(8) The defendant was provoked by the victim into committing the murder;
(9) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence

of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

* * * * * *

S.C. Code §16-3-25. Punishment for murder: review by Supreme Court of imposition of death penalty.

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(C) With regard to the sentence, the court shall determine:
(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in §16-3-20, and
(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding

correction of errors, the court, with regard to review of death sentences, shall be authorized to:
(1) Affirm the sentence of death; or
(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of §16-3-20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(F) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

B

83-6226

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

ORIGINAL

STERLING BARNETTE SPANN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED

Petitioner, Sterling Barnette Spann, respectfully moves this Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court. The affidavit of petitioner in support of this motion is attached hereto. At all times in the State Courts, he was deemed indigent.

Presented herewith is a Jurisdictional Statement of the moving party.

Respectfully submitted,

Elizabeth C. Fullwood

ELIZABETH CAUGHMAN FULLWOOD

South Carolina Office of
Appellate Defense
Suite 301, 1122 Lady Street
Columbia, South Carolina 29201

Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____ 83-6226

ORIGINAL

STERLING BARNETTE SPANN,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF STERLING BARNETTE SPANN
IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, Sterling Barnette Spann, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. _____

8/1981 — $400/mo.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months. _____

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes, state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. N/A

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Sterling Barnette Spann

SWORN TO and subscribed before me
this 2nd day of February, 1984.

Notary Public for South Carolina
My Commission Expires: 4/26/89.

G
M

ORIGINAL

83-6226

IN THE

UNITED STATES SUPREME COURT

RECEIVED
APR 5 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

APPEAL FROM THE SOUTH CAROLINA SUPREME COURT

STERLING BARNETTE SPANN,

Appellant,

-vs-

STATE OF SOUTH CAROLINA,

Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee would show unto this Court as follows:

I.

This case contains a unique factual situation. On October 5, 1981, the South Carolina Supreme Court altered one of the elements of the common law crime of burglary. State v. Brooks, 277 S.C. 111, 283 S.E.2d 830 (1981). The common law definition of burglary was the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony therein. In Brooks, the court declared that only the intent to commit a crime would be required.

The court said, "any indictment hereafter which charges one with breaking and entering the dwelling of another in the nighttime with intent to commit any crime, a felony or a misdemeanor, is sufficient." 283 S.E.2d at 831 (emphasis added). The present indictment was written on October 19, 1981 (Tr. p. 1359), two weeks after the decision in Brooks. Hence, it could properly have contained the new language, "... with intent to commit a crime therein," although an old form was used which contained the old "felony" language. With Appellant's approval, the indictment was amended so as to conform to the language in Brooks. (Tr. p. 1053, line 12 - p. 1054, line 10). The trial judge's jury instructions defined burglary in accordance with the Brooks definition. (Tr. p. 1131, line 11 - p. 1133, line 18).

The jury convicted Appellant of burglary, robbery, criminal sexual conduct in the first degree and murder.

II.

On appeal to the South Carolina Supreme Court, Appellant argued that his burglary conviction was improper because Bouie v. Columbia, 378 U.S. 347 (1964), prohibits unforseeable and retroactive judicial expansion of the common law.

Appellant then argued that because his conviction for burglary was improper, his sentence of death based on the jury's finding of burglary as an aggravating circumstance was also improper.

III.

Appellee argued that Bouie, supra, prohibits unforseeable and retroactive judicial expansion of a statute. The Bouie decision does not affect a state court's ability to alter the common law. Appellee also argued that Appellant did not receive any conviction or sentence which he would not have anticipated at the time of the offenses. Thus, Appellant's burglary conviction and death sentence were proper.

IV.

In its opinion, State v. Spann, ___ S.C. ___, 308 S.E.2d 518 (1983), the South Carolina Supreme Court held Appellant's argument on this issue to be meritless because, "The amendment of the indictment did not create a greater punishment than would have attached at the time of the offense." The court cited State v. Logan, 277 S.C. 252, 286 S.E.2d 126 (1982), in support of this proposition.

V.

Appellant now seeks an appeal to this Court pursuant to 28 U.S.C. §1257(2), which provides for review by the Supreme Court by appeal "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

VI.

This appeal is not within this Court's jurisdiction because the constitutionality of S. C. Code Ann., §16-3-20(C)(a)(1)(d) was not challenged at trial or on appeal to the South Carolina Supreme Court. Thus, the statute's constitutional validity was not expressly passed on by the South Carolina Supreme Court.

VII.

In Bouie v. Columbia, 378 U.S. 347 (1964), the State Supreme Court had created an "unforseeable and retroactive judicial expansion of narrow and precise statutory language." 378 U.S. at 352. This Court reversed Appellants' convictions on the principle that the due process clause requires a criminal statute to give fair warning of the conduct which it prohibits. At the time the Appellants in Bouie committed the alleged offense, they had no way of knowing that their actions were unlawful.

In light of the South Carolina Supreme Court's holding in the present case that, "The amendment of the indictment did not create a greater punishment that would have attached at the time of the offense," the court's decision was correct under Bouie. Thus, no substantial federal question is presented.

WHEREFORE, pursuant to United States Supreme Court Rule 16, Appellant asks that the Court dismiss this appeal, or in the alternative, that it affirm Appellant's conviction and sentence.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

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Columbia, SC 29211
(803) 758-5298

BY: Harold M. Coombs, Jr.
ATTORNEYS FOR APPELLEE

Columbia, South Carolina.

April 3, 1984.

CR

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A TRUE COPY OF Motion to Dismiss or Affirm HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING 1 COPIES IN AN ENVELOPE PROPERLY ADDRESSED WITH POSTAGE PREPAID THIS 3rd DAY OF April, 1984

Harold M. Coombs, Jr.
ATTORNEY FOR Appellee

SWORN TO BEFORE ME THIS 3rd DAY OF April, 19 84

Notary Public for South Carolina (L.S.)
My Commission Expires 5/26/86